

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL WITH AFFIDAVIT OF SERVICE

77-1064

To be argued by
STANLEY A. TEITLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1064

UNITED STATES OF AMERICA,

—against—

JOHN McGRATH,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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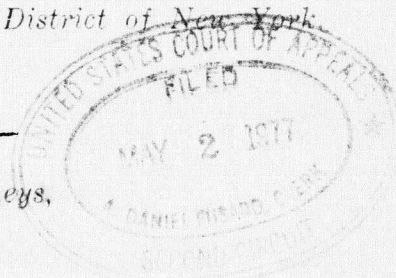


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—against—

JOHN McGRATH,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

John McGrath appeals from a judgment, entered on January 21, 1977, in the United States District Court for the Eastern District of New York (Bramwell, J.), after a four week jury trial, which convicted him of (1) tax evasion, in violation of Title 26, United States Code § 7201 (Counts One, Three, Five, Seven and Nine); (2) declaration of false and fraudulent income tax returns, in violation of Title 26, United States Code § 7206 (Counts Two, Four, Six, Eight and Ten); and extortion, both by the wrongful use of fear of economic loss and under color of official right, in violation of Title 18, United States Code § 1951 [Hobbs Act] (Counts Thirteen, Fourteen and Fifteen).¹ Appellant was sentenced

¹ The jury acquitted appellant on Counts Eleven and Twelve.

to a term of imprisonment of one year and one day to run concurrent on Counts Thirteen, Fourteen and Fifteen. The Court suspended imposition of sentence on Counts One through Ten, fined appellant \$500.00 dollars on each of these counts in lieu of a prison term and assessed him \$8,662.75, the cost of prosecution. Appellant is free on bail pending this appeal.

On this appeal, appellant does not challenge the sufficiency of the evidence. Rather he claims that the District Court improperly allowed the Grand Jury, after the petit jury had been sworn, to amend the extortion counts (Counts Eleven through Fifteen) of the indictment in order to correct an error in the description of appellant's employer. In a similar vein, appellant further argues that his motion to dismiss the indictment, made prior to amendment and after the trial jury was sworn, should have been granted. He also contends that the Court abused its discretion in not granting a pretrial motion to sever the tax counts (Counts One through Ten) from the extortion counts (Counts Eleven through Fifteen). Finally, appellant challenges several evidentiary rulings.

Statement of Facts

A. Introduction

The Long Island State Park Commission ("Commission") oversees the operations and approves policies and programs for the Long Island State parks, parkways, boat channels and Jones Beach. The Commission's daily operations are handled by its administrative office located in Babylon, Long Island, which manages and operates the state parks, arboretums, preserves and roadways within the Commission's jurisdiction. Supervision of the parks, parkways, the park police, and bids and contracts are also integral parts of its function. For purposes of servicing disabled cars, the parkways are

divided into five sections, each operated by a private tow truck operator who has an exclusive franchise granted by the Commission to tow cars from his particular section of the parkway.

Appellant John McGrath held the position of Park Maintenance Supervisor for approximately twenty years until his 1974 retirement. Among his major functions were the supervision of both the gas stations and the five private garages operating on the parkways as well as supervision of the progress of impounded vehicles. The evidence adduced at trial made clear that appellant McGrath was the central figure in a pattern of political corruption which pervaded the process by which towing contracts were obtained. McGrath, almost without exception, was the public official directly involved in the approval of these contracts, and it was his personal responsibility to handle all administrative matters relative to the towing operators.

At the time of McGrath's retirement in 1974, the five authorized tow truck operators were Charles Ancona, Victor LaGuardia, Santo Russo, Ralph Signoriello and Eugene Ravasio. Salvatore Gullo was Ravasio's predecessor. At trial, each of these operators, other than Ravasio, described a series of illegal cash payments which they were required to make to McGrath in order to continue in business on their particular section of the parkway. Each explained that he had paid McGrath \$1,000.00 per year prior to 1971 and thereafter \$1,500.00 per year from 1971 through 1973. In addition, several of the operators testified that, at the request of appellant McGrath, they had created fictitious and inflated invoices. The testimony of these five towing operators constituted the Government's extortion case against McGrath.

The evidence adduced at trial also established that appellant had failed to report on his personal income tax

returns, over a five year period, the money which had been illegally generated by his extortionate demands upon the various towing operators. The Government also proved that appellant McGrath had derived substantial rental income from two houses, which income again he failed to report on his personal income tax returns, and that he also knowingly failed to report certain interest income received from savings accounts. In sum, it was shown that not only had McGrath failed to report substantial sources of income derived from extortion and kickback demands, but also that he wilfully failed to report large sums of income from rental properties, capital gains, and bank and mortgage interest.

B. The Extortion Case

1. The Ancona Operation

Since 1958, Charles Ancona, president of Charlie's Auto Center ("Charlie's") of North Bellmore, New York, was engaged in automobile collision work, repairs and towing on the Long Island State parkways (1046). Operating directly under the authority of the Commission, Ancona derived approximately sixty-five percent of his gross income from the parkway operations. Additionally, his business included servicing all disabled vehicles on a large section of the parkways (336-7).

In 1958, when Ancona was first offered a contract to service cars on the highway, McGrath was introduced to Ancona as the Commission's Park Maintenance Supervisor. McGrath thereafter visited Charlie's approximately once each month and oversaw Ancona's operations, forwarded to him customer complaints and ascertained whether Ancona abided by the Commission's rules and regulations (121-4). Indeed, all of Ancona's communications with the Commission were sent to and from McGrath (129). McGrath served in a similar supervisory capacity over the

remaining four towing operators. (414-6; 716; 719-20; 924-5; 1197-9).) Ancona, like the other operators with whom McGrath dealt, believed that McGrath had the complete authority to designate the highway towing operators and to terminate their highway operations (133-4; 423; 428; 784; 979; 1226); and, perhaps most importantly, each operator feared that his failure to make McGrath's extortion payments would result in the loss of his parkway towing operations (146; 428; 716-7; 934; 1226).

The pattern of McGrath's extortionate conduct was simple. In 1969 and 1970, at a series of clandestine meetings in Ancona's office, Ancona paid McGrath \$1,000.00 in cash each year (134-5). From 1971 onward, Ancona paid \$1,500.00 per year, again, in cash (137). As with all of the towing operators, the extortion payments came from their business (158; 427-8; 724; 936; 1218; 1221-2).

For well over a decade, Ancona served as McGrath's liaison with the various towers, and over the years, McGrath would advise Ancona whether payment had been received by him from the operators (164). Indeed, Ancona had numerous conversations with the other towers regarding their payments. For example, in or about 1960, when an opening occurred, upon McGrath's inquiry, Ancona recommended Ralph Signoriello as a replacement operator (160). During a visit to Charlie's in 1969, McGrath complained that Signoriello was experiencing difficulty in making payment. McGrath responded that he viewed this with disfavor, but at a subsequent date, McGrath told Ancona that Signoriello had in fact paid (162-4).

Again, during a 1971 visit, McGrath indicated to Ancona his displeasure with Salvatore Gullo's failure to

make a \$1500.00 payment. McGrath advised Ancona that he, McGrath, knew others who were ready, willing and able to make more lucrative payments to him for the parkway position (142-3). In early 1972 McGrath again complained to Ancona that Gullo had failed to pay, and in McGrath's presence, Ancona called Gullo only to learn that Gullo was in fact experiencing business difficulties, but that he would soon attend to the matter (150). On another occasion, after Gullo left the parkway in 1973, McGrath solicited Ancona's assistance to locate a suitable replacement. Ancona suggested Eugene Ravasio. Ancona advised Ravasio that McGrath wanted \$5,000.00 from Ravasio for Ravasio to assume Gullo's section of the parkway (165). Thereafter, in May 1973, Ravasio obtained a parkway towing franchise (172).

In addition to his extortionate demands, appellant was also a participant in various illegal kickback schemes. For example, Ancona described that during a 1969 snowstorm, in order to generate additional payments, McGrath directed several of the operators to move disabled cars off the road to permit Commission snowplows to clear the roadway (174, 429, 441, 443). McGrath advised Ancona, LaGuardia and Signoriello to submit claims to the Commission for false hours of work (176, 442-5, 943). In fact, one operator, LaGuardia, admitted that he had not performed any of the specified services (443). Following payment by the Commission for these towing services, the operators were required to forward a portion of the reimbursement monies to McGrath (176, 446, 944).

2. The LaGuardia Operation

Since 1968, Victor LaGuardia, Ancona's brother-in-law, operated the Triple Arc Collision and Victor's Auto Center in Hempstead, New York (373-4). Like Ancona, LaGuardia derived a substantial portion of his business from the parkway operations (381). LaGuardia, who had previously been a subcontractor for a parkway operator, contacted McGrath in 1968 at a time when the original towing operator was experiencing litigation difficulties (383). LaGuardia met McGrath in June, 1968 and told him that he wanted the highway section (383). McGrath then demanded \$5,000.00 down and \$1,000.00 per year in cash from LaGuardia but did not expressly state the purpose of the payment (386). Although he testified that he was unaware of the underlying purpose, LaGuardia stated that he believed that he had to pay in order to obtain the franchise, and that in the absence of payment, he would not have been given the parkway operation (391).

In July, 1968, LaGuardia and McGrath met in McGrath's car where LaGuardia paid \$2,500.00 in cash from his business account and promised to pay the balance shortly thereafter (397). McGrath handed LaGuardia a Commission memorandum from McGrath to Humble Oil, dated July 18, 1968, authorizing LaGuardia's franchise (393-4). Several months later LaGuardia paid the \$2,500.00 balance due (409), and in October, 1968, LaGuardia obtained the highway towing contract (413-4). LaGuardia paid McGrath \$1,000.00 a year in 1969 and 1970, and \$1,500.00 a year in 1971, 1972 and 1973 (425; 427-8).

3. The Russo Operation

In 1957, Santo Russo was operating a gas station when he was introduced to McGrath as the Commission's Park Maintenance Supervisor (715). Thereafter, Russo obtained a towing operator's franchise. Subsequently, McGrath advised Russo that a \$500.00 payment would be due at Christmas to keep Russo "out of trouble" (716). Russo interpreted "trouble" as an economic threat. Thereafter, and continuing through 1960, Russo made the required \$500.00 payments to McGrath (717).

In 1960 Russo's operation was extended by the addition of the Sunken Meadows Parkway. At this time, McGrath approached Russo and advised him that since he was operating on a section with more mileage "it was going to cost him another \$500.00 a year" (710). After he paid the additional money, Russo obtained jurisdiction over this new section (718). From 1960 through 1970, Russo paid McGrath \$1,000.00 a year from his business funds. The payments were always in cash and surreptitiously delivered to appellant in either McGrath's or Russo's car. In 1969 and 1970, Russo paid \$1,000.00 in cash and from 1971 through 1973 he made cash payments of \$1,500.00 (721-3).

4. The Signoriello Operation

Ralph Signoriello, president of Alray Collision Corporation, was a former employee of Charles Ancona. Signoriello applied for the parkway operation in 1960. Signoriello met McGrath during one of McGrath's inspection visits to Alray. Thereafter, McGrath served as his contact and helped him obtain a towing franchise (929).

After he began operating on the parkway, Signoriello was advised by Ancona that he would be required to pay McGrath \$1,000.00 each year at Christmas time. Signoriello skimmed cash from his business and annually made two "installment" payments to McGrath, totalling \$1,000.00 (932-3). Signoriello always hand-delivered the money to McGrath in an envelope, under the table, at a diner (926, 933). Signoriello's payments increased to \$1,500.00 per year in 1971, and continued at that rate through 1973.

5. The Gullo Operation

From 1968 through 1973, Salvatore Gullo made the required payments to McGrath. Prior to 1967, Gullo worked for his father, who, when he retired in 1967, turned the business over to his son. Soon thereafter Gullo attended a towing operators' meeting held at Charlie's. During this meeting Gullo was advised that he would be required to make \$500.00 payments to McGrath (1202-4; 1216-18).

In 1967, Gullo paid McGrath \$500.00 and McGrath told Gullo that he, McGrath, was pleased that Gullo was "taking care of the matter" as his father had done (1219). In 1969, the payment increased to \$1,000.00 and then to \$1,500.00 in 1971. Gullo recalled meetings of the tow operators at which these matters were discussed.

In 1968 Randolph Taylor, an off-duty parkway policeman moonlighting as a night dispatcher for Gullo, was present in Gullo's office when Gullo and his wife were counting the daily receipts (1220; 1400). Taylor observed Gullo put a stack of twenty dollar bills in an envelope and place it into his shirt pocket (1410). Gullo then left the office (1410). Approximately five minutes later, as Taylor exited the office, he saw McGrath approach Gullo and then observed Gullo give the envelope to McGrath.

In 1972, Gullo was unable to make the full \$1,500.00 payoff to McGrath because of other pressing business expenditures, and delivered only \$1,000.00. Gullo promised to pay the balance at a later date, but McGrath was apparently annoyed at Gullo's failure to remit the full sum (1223). In early 1973 McGrath advised Gullo that a third party wanted to obtain Gullo's section of the parkway (1224). Three days later McGrath visited Gullo's shop and repeated the message (*Id.*). Gullo stated that this was "o.k." with him so long as McGrath gave him sufficient notice in order to allow him to cancel an order for two new tow trucks (*Id.*). During a later visit to Gullo's shop, McGrath repeated this threat and Gullo questioned McGrath as to the amount of payment. McGrath at first denied that he had received any money and then replied "\$20,000.00" (1225). Gullo advised McGrath that he had "had enough of the parkway" and wanted to leave in April or May, 1973. Gullo's highway towing operations terminated on May 15, 1973. Thereafter, Higbie Collision inherited the Gullo section of the parkway (1225) and Gullo never paid McGrath the balance of money that was owed.

C. The Tax Counts

An extensive investigation into the financial background of John McGrath was conducted by agents of the Internal Revenue Service. The investigation revealed that none of the approximately \$31,000.00 generated by appellant's extortionate demands was reported by McGrath on his original federal income tax returns for the years 1969 through 1973, which were timely filed. Nor were such moneys reported on his amended tax returns for these years which were filed in 1974 (1536-38; 1541; 1550-53; 1559; 1562; 1564; 1576; 1600). In late November 1974, after the investigation in this case had been underway for some months, and after McGrath had been notified that he was under investigation by the Internal Revenue Service, he filed these amended tax returns, for the years 1969 through 1973, and declared

previously non-reported rental income, income from various sales of real property and certain interest income (995; 1016-17; 1061-62).

From 1969 through 1973, appellant and his wife jointly owned savings accounts at five different savings institutions (1539). The IRS investigation disclosed that for these years appellant originally failed to report a total gross interest income of \$2709.89, with material omissions occurring in each taxable year (1539; 1542; 1543; 1548-49; 1668).

During some of the years in question McGrath owned three rental properties, two of which were located on Fire Island, the third at Amagansett, Long Island. Appellant's original tax returns for the relevant time periods consistently revealed either a loss or insubstantial gain in his rental income; McGrath's amended tax returns, however, disclosed substantial gains in rental income for those years (1578). Thus, for example, appellant's original 1969 tax return reported rental income solely from one of his Fire Island properties and claimed a loss on this venture (1555-58); McGrath's amended 1969 tax return included rental income from his additional two properties which resulted in a net gain in rental income for two years (1555; 1557). An identical pattern of wilfull failure to report rental income occurred for certain of remaining taxable years charged in the indictment (1560-64).

In addition to the extortion, rental and interest income tax evasion, McGrath's 1972 original tax return failed to reveal the sale of his Islip house in 1972 to Pieter Van Rikxoord and his wife (1570). Appellant conveyed title to the Van Rikxoords on June 2, 1972 for a purchase price of \$24,000.00 (1164-65; 1571). Although the evidence indicated that McGrath had purchased the home earlier in the year from his mother for \$1,000.00, he estimated his basis as \$12,000.00 (1572). Despite the

fact that the sale resulted in a short-term capital gain McGrath reported the gain as long-term (1573-75), thereby unlawfully reducing the \$12,000.00 gain to \$6,000.00. Additionally, while McGrath financed the sale himself as mortgagee, he likewise failed to report for 1972 any mortgage interest income which he received from the purchase (1575). Like the sale of his mother's home, McGrath also failed to report in 1973 the sale of one of his Fire Island Houses, known as the "red house", for a selling price of \$26,000.00 (1116-17; 1581-82), even though he realized a net gain in excess of \$10,000.00 (1583).

In short, a comparison of appellant's original tax returns with his amended returns established to the jury's satisfaction a failure to report approximately \$72,000.00 in gross income, which, when broken down for each taxable year amounted to, on the average, more than half of appellant's income.²

² McGrath failed to report \$7,194.29 in gross income for 1969 (1557). His 1970 original tax return failed to disclose \$8,484.53 in gross income (1561). For the tax year 1971, he omitted \$11,395.07 in gross income (1562), and in 1972 he failed to report \$23,446.52 (1564). In 1973 he omitted \$21,843.29 from his return (1678). In percentage form, McGrath failed to report 49 percent of his income in 1969, 49 percent in 1970, 54 percent in 1971, 54 percent in 1971, 70 percent in 1972, and 66 percent in 1973 (1586).

The Government established the following figures regarding the McGrath tax returns for the years in question:

Year	Taxable Income	Tax Due	Corrected	Corrected
	Per Return	Per Return	taxable income	tax due
1969	\$ 7,651.17	\$1,490.50	\$14,845.46	\$3,268.51
1970	8,888.55	1,641.48	17,373.08	3,735.57
1971	9,485.71	2,154.40	20,880.78	4,061.85
1972	10,852.08	2,007.46	34,298.61	8,740.12
1972	11,928.73	2,224.21	33,772.02	9,177.93

(1674-79).

D. The Defense

Appellant chose to testify in his own defense. He stated that he had received official appointment as the Commission's Park Maintenance Supervisor in 1955 (2039-40). For eight to ten years immediately preceding his retirement in 1974, McGrath concurrently held this position with the Jones Beach State Parkway Authority (2041). McGrath recounted that from the 1950's until his retirement, his duties for both entities were substantially the same (2129-30). In an effort to minimize his power, he claimed that he was the Commission's "low man on the totem pole" (2168-69; 2154), but he acknowledged that he had in fact supervised the general parkway foreman, and the lesser parkway foremen and assistant foremen (2169-70), oversaw planting (2171), sanding and snow removal operations on the parkways and inspected the parkway gas stations (2129; 2173). McGrath also acknowledged that regarding complaints from the public, he represented both the Commission and the Jones Beach authority (2172-73), although he claimed that only a small portion of his time was expended in these efforts (2130). McGrath further noted that he spent little time inspecting the towing operators' equipment and visited them quite infrequently (Id., 2138).

Appellant denied the solicitation or receipt of any money from any of the towing operators (2143-44; 2150); rather, he unequivocally asserted that each of the towing operators had lied about the payoffs (2197). McGrath flatly denied that he had threatened the operators and opined that he never had the express authority to authorize the appointment of a towing operator or to remove one from the parkway (2155). He stated that he never took any action to terminate an operator's contract and that, even had that been his desire, he was powerless to effect such a result (2156).

McGrath, in an attempt to controvert the indictment's tax counts, explained that, throughout his life until 1973, he had always personally prepared his tax returns (2082). He stated that in order to improve his comprehension of tax preparation matters he had purchased and utilized several income tax preparation books (2092; 2084-85) as well as the routine IRS instruction manuals (2199). He also kept and referred to copies of his tax returns from prior years (2209; 2300-01). McGrath contended that he maintained records so as to ascertain all of his reportable income and deductible expenses (2208; 2198, 2204), and relied almost exclusively upon his own understanding of the tax manuals. In 1974, for the first time, McGrath consulted a tax attorney, who prepared his amended tax returns (2085).

Appellant admitted that, during the calendar years involved, he was aware of his obligation to report all earned bank interest (2272-73), conceded that the tax preparation books upon which he relied so provided (2273-74), and also recited that mortgage interest income (2267) and rental income were likewise reportable (2220-21). In explaining his failure to report the interest income, appellant claimed that two of his joint bank accounts were time savings accounts and were, consequently, as he understood the law, tax exempt (2044-45; 2051).³ Despite his lack of knowledge on the sub-

³ McGrath stated that bank officials at both institutions, whom he was unable to identify (2292-93; 2315), told him that he was obligated to leave his money in the accounts until their maturity date, and that so long as the funds remained on hand the interest earned on the principal need not be reported on his tax returns (2044-45; 2051; 2291-92; 2315-16). We note that the deposit certificate for one account (Williamsburg Savings Bank) stated that interest would be credited quarterly and could be withdrawn without penalty (2316). Furthermore, the interest payable to the other time account (Suffolk County Federal Savings and Loan Association) was credited to McGrath's regular savings account in this same bank (2294; 2297). Appellant denied knowledge of the transfer of this interest among accounts. (2297).

ject of bank interest, however, appellant did report interest from one such "time account" in his original 1972 tax return (2317-18). McGrath claimed that he "may" have received a form 1099 for the 1971 calendar year for this account and thus "automatically" included the interest on his 1972 tax return without having intended to do so. (2318).

Appellant stressed that he calculated his bank interest for purposes of his tax returns from his 1099 Forms (2081; 2298-99). He admitted a complete failure to report any interest earned on bank accounts at the Richmond Hill Savings Bank (2312-13), and the Franklin National Bank [later known as the European American Bank] (2310-12). McGrath denied receiving 1099 forms for many of his accounts for the years in question (2314, 2293), but admitted that despite this he never complained to any of the banks about their non-receipt (1336; 1373). In addition, he disclaimed any knowledge during the years involved of a trust account for his daughter (2065-66; 2034-35), and even after learning of its existence, acknowledged that he still failed to report earned interest because of his purported belief that, again, at least as he understood the law, money held in trust always "belongs to the beneficiary" (2066; 2304).

In a like vein, though admittedly aware of his obligation to report rental income (2218), McGrath failed to report such income from his Amagansett house for the calendar years 1969 through 1973 (2212; 2221-22). McGrath explained this and other income omissions by claiming to have believed that rental income was not reportable until such time as a full return of capital investment was realized (2056, 2061). Thus, from 1969 through 1973, McGrath reported rental income from only one of his Fire Island properties, known as the "red house" (2061), but not from his additional Fire Island house, the "gray house" (2218).

On December 14, 1973, McGrath conveyed his "red house" to the Kleins (2108-10; 2267-68). Though he did not challenge the accuracy of the closing statement (2268), McGrath flatly denied receiving any payment at closing and hence, according to him, he received no income from the sale. (2268-69; 2115). When confronted with the fact that appellant's endorsement appeared on the actual check dated December 14, 1973, McGrath claimed that he did not receive the check until January 1974 (2116). McGrath further claimed that he believed that the proceeds from the sale were to be reported only in the years received and consequently there was no reason to report the sale. When asked why the income was accurately reported in his 1973 amended tax return, McGrath stated that this was a "mistake" on his part (2271-72).

Also not reflected in appellant's original 1972 tax return was the capital gain income from the sale of his mother's home. In 1972 McGrath's mother conveyed to him her Islip, Long Island home (2092-93). The deed, dated February 29, 1972 and prepared by appellant himself (2094), recited \$1000.00 as consideration for the conveyance (2054, 2238). Despite the deed's recitation, McGrath denied paying any such money to his mother (2094-95; 2238) on the theory that in reality he had been the donee of this "gift." The consideration was recorded in the deed, he claimed, only because he felt that "some consideration had to be stated in a deed" (7240-51).

Later that year, McGrath sold the house to a third party for a selling price of \$24,000.00 (2239; 2259), and McGrath claimed he paid approximately one-half of these funds to his mother in compliance with her request (2264-65).⁴ As part of the sale McGrath executed a purchase

⁴ Apparently McGrath felt that this would explain the fact that his amended 1972 tax return reported only half the real gain. (See 1573-74).

money mortgage in favor of the third party (2201) and, as mortgagee, he began receiving mortgage payments in mid-1972 (2266). Neither the gain on the sale of the house, nor the mortgage interest payments to McGrath were reported on his income tax returns (2266-67). By way of explanation, appellant claimed that he was not required to report the capital gain realized from the sale because he received the property as a "gift" from his mother rather than by purchase, and gifts, including income derived therefrom, were deemed by McGrath to be tax-free items. (2108; 2237-38). To add at least ostensible consistency to his "gift" theory, McGrath claimed that in 1972 he did not report the purchase money mortgage interest because he, in turn, had given the funds as a gift to his now deceased mother (2274-76).

Finally, McGrath, in addition to expressing his own personal understanding of the federal income tax law, asserted that he never filed a tax return knowing or believing it to be false, never deliberately omitted any income and never intended to evade paying any tax owed the Government (2119, 2157, 2257, 2380). After calling six reputation witnesses, each of whom testified as to appellant's good character, (1908, 1979, 1985, 1987, 1993, 2034-34a) and other witnesses in an attempt to prove the non-existence of the Commission prior to 1972, the jury retired, deliberated and found appellant guilty on thirteen of the fifteen counts charged in the indictment.

ARGUMENT**POINT I**

There Was No Error With Respect to the Procedure Employed by the District Court Concerning the Amended Indictment.

1. Introduction

After opening statements, appellant moved to dismiss Counts Eleven through Fifteen of the indictment, each of which charged him with extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. He alleged specifically that each count was fatally defective on jurisdictional grounds because the indictment charged that McGrath was an employee of the "Long Island State Parks and Recreation Commission" during 1969 through 1973 when, in fact, the Commission was called the "Long Island State Park Commission" prior to September 1972. Thereafter, before continuing with the trial and during an adjournment, the Government reconvened the special corruption Grand Jury which had filed the indictment. The Grand Jury then voted to amend the indictment by correcting all references to the "Long Island State Parks and Recreation Commission" to read "Long Island State Park Commission" for the period prior to September 1972. The amendment merely deleted the words "and Recreation" from the indictment for this period.

Appellant now raises additional arguments beyond that which he raised below. He now argues that the Grand Jury was powerless to vote the amendment after trial had begun and hence that it was *void ab initio*. He then reasons that the Court consequently erred in sanctioning this procedure. As an additional argument, he urges that, even assuming that the amendment was

proper, it resulted in substantial prejudice to him. As we show below, the amendment (a) was entirely within the lawful province of the grand jury, (b) was merely a non-jurisdictional, cosmetic variance which was waived by appellant's failure to raise the point until the jury had been sworn so as to be able to deceptively raise a spurious Double Jeopardy claim, and (c) created no prejudice to appellant since it exclusively dealt with a mere correction of the proper name of appellant's employer and, was at most mere surplusage and not a material element of a Hobbs Act charge.

2. The Amendment Was Proper

Appellant's principle reliance upon *Ex Parte Bain*, 121 U.S. 1 (1887) and *Stirone v. United States*, 361 U.S. 212 (1960) for the proposition that a grand jury is powerless to amend an indictment is, to say the least, misplaced. The indictment in *Bain* was invalidated because it had been amended by the trial court, without resubmission to the grand jury, and for on other reason.⁵ The Court squarely held that "the jurisdiction of the offence [was] gone" because the amendment was not "properly presented by indictment." *Bain, supra*, at 13, (emphasis supplied). The reason for the rule requiring a grand jury to effect an amendment rather than permitting a court or prosecutor to do so is "the great importance which the common law attached to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says, 'no person shall be held to answer' may be frittered away until its value is almost destroyed." *Id.* at 10. It does not lie within the province of a court or prosecutor to alter or modify the charging part of an indictment to suit their own notions "of what

⁵ Completely distinguished from *Bain* and *Stirone* is *United States v. Consolidated Laundries Corporation*, 292 F.2d 563 (2d Cir. 1963), also heavily relied upon by appellant. There the granting of the prosecutor's motion to amend resulted in "[t]he substitution of one defendant for another." *Id.* at 571.

it ought to have been or what the grand jury would probably have made if their attention had been called to suggested changes." *Id.*

The *Bain* rule, which has never been disapproved, was reaffirmed and further liberalized in *United States v. Stirone, supra*. Stirone, like McGrath, was indicted and convicted for interfering with interstate commerce by extortion in violation of the Hobbs Act. The indictment charged, among other things, that interstate commerce was affected by the *importation of sand into Pennsylvania* in order to build a steel plant. The trial court allowed evidence to be introduced which established interference with the *exportation from Pennsylvania of steel* to be manufactured in the steel plant. The jury was thereafter instructed that its conviction could be based upon findings of interference with either the importation of sand or the exportation of steel. Stirone's conviction violated the cautionary directive in *Bain* "that after the indictment was changed it was no longer the indictment of the grand jury who presented it." *Bain, supra*, at 13. See also, *United States v. Norris*, 281 U.S. 619, 622 (1930). While the grand jury was satisfied to charge that Stirone's unlawful conduct interfered with the interstate importation of sand, neither the *Stirone* Court "nor any other court [could have known] that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel." *Stirone, supra*, at 217. In *Stirone*, while the trial Court did not permit the formal amendment of the indictment, the effect of what the Court did was the same, thus resulting in the deprivation of Stirone's basic right to be tried only on charges presented by indictment. The Court, in its more expansive view of *Bain*, held that an amendment by the trial Court also would have been proper had the matter been trivial, useless or innocuous.

Here, too, the amendment was innocuous, cosmetic and immaterial. See discussion, *infra*, at Point I(3) and (4). In both *Bain* and *Stirone*, the Court rather than the

grand jury amended the indictments. However, in order to fully and scrupulously adhere to the underlying principles of both cases, the special corruption Grand Jury chose to speak rather than subject its intentions to speculation by the Court or prosecutor.

Moreover, we note by analogy, that under Rule 7(e), Fed. R. Crim. P., the Court may permit the prosecutor to amend an information at any time before final verdict so long as no additional or different offense is charged and no substantial rights of defendant are prejudiced. Since the prosecutor is free to charge in an information, he is likewise empowered by the Rules to amend that information. See, Wright, Federal Practice & Procedure § 128. It is difficult to postulate a single policy reason why a grand jury should somehow be prevented from doing precisely what the prosecutor is allowed to do, at least so long as no additional charge has been added or substantial prejudice has arisen. Cf., *United States v. Pelose*, 538 F.2d 41, 45 (2d Cir. 1976).⁶

3. The Failure To Timely Object To The Unamended Indictment Constituted A Waiver Under Rule 12 (b), Federal Rules Of Criminal Procedure

The failure of appellant to timely move to dismiss the unamended indictment constituted a waiver of this objection. Rule 12(b), Fed. R. Crim. P.

We submit that to characterize as jurisdictional this motion made after the beginning of trial was an attempt to artfully avoid Rule 12(b), which requires motions to dismiss on non-jurisdictional grounds to be

⁶ In view of *United States v. Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975), the Court could have alternatively dismissed the indictment's language as surplusage. See, also, *United States v. Colasordo*, 453 F.2d 585, 590 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972). However, we believe that the procedure in this case was one solution to the problem posed in *Cirami* concerning amendments.

made before trial. Significantly, appellant offered no explanation for his failure to timely make this motion. Appellant was obviously aware of this issue since he knew the proper title of his agency. Moreover, no compelling reason was proffered why he had not requested a bill of particulars on this issue. In short, McGrath had shown no adequate reason for the Court to have granted relief from his failure to timely raise the objection. Cf. Rule 12(f). His failure to timely move, therefore, can only be attributed to an attempt to "sand-bag" the prosecution. To sanction this practice would be "sanctioning the playing of games" by a defendant. Cf. *United States v. Salzman*, 548 F.2d 395 (2d Cir. 1976).

The unamended indictment was sufficient. The description of the Commission in the indictment was, as set forth below, *infra*, mere surplusage and did not affect the sufficiency of the indictment. It fully met the test set forth in *Hamling v. United States*, 418 U.S. 87 (1974). There the Supreme Court formulated the criteria upon which the sufficiency of an indictment is to be tested: An indictment must (i) contain the elements of the offense charged, (ii) fairly inform the defendant of the charge against him, and (iii) enable the defendant to plead an acquittal or conviction in bar of future prosecution for the same offense. *Hamling* further held that an indictment is sufficient provided it sets forth the words of the statute in such a fashion so as to fully and expressly set forth all of the elements necessary to constitute the offense. General statutory language may be utilized by the Government so long as it is accompanied by a statement of the facts that will inform an accused of the specific offense with which he is charged. *Id.* at 111-118. We submit that the indictment, judged by these criteria, was sufficient.

This Court in *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975), *cert. denied*, 44 U.S. Law Week 3658 (May 19, 1976), applying *Hamling*, specifically held that

the phrase "under color of official right" is sufficient to apprise a defendant with reasonable certainty of the accusations lodged against him. In fact, *Trotta* expressly approved this Circuit's ruling in *United States v. Palmiotti*, 254 F.2d 291 (2d Cir. 1958), where it was held that, under 18 U.S.C. § 1951, a general allegation that money had been obtained by wrongful acts of threatened force was sufficient. See, also, *United States v. Fortunato*, 402 F.2d 79 (2d Cir. 1968). *Trotta*, therefore, makes it clear that the indictment in the instant case was sufficient even in the absence of any specific reference to the source of McGrath's power.

The meaning of "under color of official right" in *Hobbs Act* prosecutions has developed to the point where the extortionist is said to act "under color of official right," even though he has no *de jure* or statutory power. Thus, the central inquiry is whether the purported victim reasonably perceived that a governmental decision would be made in a particular manner, and whether that belief was exploited by the defendant. For example, in *United States v. Mazzei*, 521 F.2d 639 (3d Cir.) (en banc), cert. denied, 96 S.Ct. 446 (1975), it was held that the phrase "color of official right" proscribed an office-holler's receipt of payments for assuring that a governmental decision will be made in a particular manner even though he had no statutory or *de jure* power to make the decision. See also *United States v. Price*, 507 F.2d 1349 (4th Cir. 1974); *United States v. Emalfarb*, 484 F.2d 787, 789 (7th Cir.), cert. denied, 414 U.S. 1064 (1973); Cf. *United States v. Varlack*, 225 F.2d 665 (2d Cir. 1955).

Clearly, McGrath's victims reasonably perceived him as he was—a government official acting through their eyes in a supervisory manner and wrongfully abusing that authority and trust. Accordingly, the exact label or title worn by McGrath or, indeed, any change in that

title is wholly extraneous to the gravamen of the charge under the *Hobbs Act*.

Therefore, the words "Long Island State Parks and Recreation Commission" may appropriately be characterized as surplusage which could not vitiate the extortion count. *United States v. Ciriaco*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); see also *Ford v. United States*, 273 U.S. 593 (1927).

4. Appellant Suffered No Prejudice

Finally, we contend that appellant McGrath suffered no prejudice from the amendment. At no time did McGrath claim that he was not the Park Maintenance Supervisor during the years in question, nor did he claim that he was not reasonably perceived by the victims of the extortion to have had the power that the indictment recited. Moreover the Government established that the difference between the pre and post-1972 Commission was nominal in the truest sense of the word.

In 1972, the name of the Commission was changed to add the word "Recreation" and all else, with a minor exception, remained the same. (1436-37).⁷ The post-

⁷ In 1968 the Long Island State Park Commission was within the New York State's Division of Parks, which itself constituted the New York State Department of Conservation (1434). In 1970 a reorganization occurred when the state legislature created the office of Parks and Recreation in Albany within the executive department of the state government and simultaneously abolished the Division of Parks (1435). The Long Island State Park Commission thereafter reported to the Office of Parks and Recreation (*Id.*) In 1972, when the name of the Long Island State Park Commission was changed to the Long Island State Parks and Recreation Commission, the general manager subsequently reported to the Commission of the Office of Parks and Recreation for certain matters rather than the Commission's Board (1435, 1852).

1972 Commission was merely a successor organization to the powers and duties of the original entity (1449). The members of the Commission, its administration and all of its employees maintained their identical prior duties and titles. From 1968 through 1974, the Babylon office of the Commission was maintained, and absolutely no changes, physical or otherwise, were made except for a minor difference in reporting matters to superiors, (1436). Indeed, the identical official forms and documents were utilized by the Commission throughout these years except for the 1972 name change (2040-41). McGrath himself retained the same title of Park Maintenance Supervisor, occupied the same physical office and was governed by the identical rules and regulations.

Appellant suffered no prejudice since the indictment not only expressly tracked the language of the statute (See 18 U.S.C. § 1951(a)(b)(2)), but also incorporated all of the relevant facts. The indictment listed the approximate dates of the violations, the victims, the fact that McGrath was Park Maintenance Supervisor and the power that he had as such. To argue that appellant did not have sufficient notice of the charges against him is frivolous.⁸

We also note in passing that each of Counts Eleven through Fifteen recited a continuing crime for the years 1969 through and including 1973. Appellant argues that these counts were defective because they deal in part with allegations prior to September 1972, when the Commis-

⁸ We note that even assuming, *arguendo*, that the amendment to the extortion counts was erroneous, this would not invalidate the judgment of conviction on the tax counts. *Chow Bing Kew v. United States*, 248 F.2d 466 (9th Cir.), *cert. denied*, 355 U.S. 889 (1957); *Carney v. United States*, 163 F.2d 784 (9th Cir.), *cert. denied*, 332 U.S. 824 (1947).

sion was known as the Long Island State Parks Commission, and not, as first alleged, the Long Island State Parks and Recreation Commission. Thus, the Government was entitled, on these counts, which charged a continuing extortion, to prove extortions subsequent to 1972, the period for which the Commission was correctly named. Thus, even assuming *arguendo* that appellant is correct, these counts were not defective in their entirety. If any relief were to have been granted, it would have only affected the time frame of the Government's proof. And, of course, proof of transactions prior to September 1972 would have been admissible as prior similar acts. See *United States v. Papadakis*, 510 F.2d 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Thus, there was no substantial error, if error at all. Rule 52(a), Fed. R. Crim. P.⁹

⁹ Appellant argues in Point III of his brief that Count Fourteen of the indictment was fatally defective because the indictment, even as amended, failed to charge the victim as Russo Brothers Service Station, Inc., rather than Russo Brothers Service Center, Inc. We submit, as we argued below, that this instance was a classic example of a typographical error (703). See *Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949); *Steward v. United States*, 395 F.2d 484 (8th Cir. 1968); *United States v. Skelley*, 501 F.2d 447 (7th Cir.), *cert. denied*, 419 U.S. 1051 (1974).

Prior to the actual trial testimony of Santo Russo, owner of the corporate victim, McGrath urged the Court to preclude him from testifying because the "real" victim was non-existent. During a *voir dire* held outside of the presence of the jury, the Government established that since 1961 Russo was in fact employed by Russo Brothers Service Center, Inc. (694-95) and that he so testified before the Grand Jury (696). McGrath again put forth his *Bain* argument, claimed that the indictment's error was a jurisdictional defect and that he suffered "extreme" prejudice because he was only prepared to defend against Russo

[Footnote continued on following page]

POINT II

The District Court Did Not Abuse Its Discretion in Denying Appellant's Motion to Sever Counts One Through Ten From Counts Eleven Through Fifteen.

By timely pre-trial motion, appellant moved under Rule 14, Fed. R. Crim. P., to sever the tax counts (Counts One through Ten) from the extortion counts (Counts Eleven through Fifteen) on the ground that he was prejudiced by the joinder of these charges. The District Court held that joinder was proper and caused no prejudice to appellant (Tr., June 2, 1976). Appellant claims that this ruling constituted an abuse of the Court's discretion and that the extortion counts should have been severed from the tax counts which, in addition to the extortion payments, concerned other unreported sources of income. The argument appears to be that because of these additional sources of income appellant was, somehow, required to testify at trial (Appellant's Br., p. 27). Furthermore, he argues that joinder of the false filing counts prejudiced him by "having the petit jury know that the Grand Jury believed defendant was a liar and a cheat" (Id., at p. 29). In sum, his argument is that "the court must presume prejudice", as he states it, "because of the cumulative effect of admitting, at the trial of the [extortion] counts, unrelated income evidence of the alleged

Brothers Service Station, Inc., the non-existent entity (705-6). The Government countered McGrath's claims by noting that *Bain* was inapplicable, the error was typographical, inadvertent, hardly jurisdictional and hence waived, and that at the conclusion of the trial it would be an immaterial variance (703, 705-6). The Court refused to preclude Russo from testifying, held appellant's motion to have been untimely and the variance to have been immaterial (704-5).

tax crimes [which was] equatable to perjury and cheating" (Id. at p. 32).

We disagree. It is the Government's contention that since the joinder was unquestionably proper, as the District Court impliedly held, it was not an abuse of the Court's discretion to refuse to sever the counts. Moreover, we contend that under the circumstances of this case a severance would have simply been unwarranted and improper.

Rule 8(a), Fed. R. Crim. P., permits the joinder of offenses "if the offenses charged * * * are of the same or similar character or are based on the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common plan or scheme." Application of this rule, which "is construed broadly to allow liberal joinder", *United States v. Isaacs*, 493 F.2d 1124, 1158 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) compels the conclusion that the District Court correctly held that there was no misjoinder. One source of unreported income was the payments made to appellant by the towing operators. Thus, the tax offense, at least as to a major portion thereof, was based on the "same act or transaction" and thus squarely falls within the express language of Rule 8(a). Moreover, the law is settled that it does not constitute an abuse of discretion to permit such joinder "where the underlying crime generated the income tax violations." Id., at 1159.

The other sources of alleged unreported income, i.e., bank and mortgage interest, capital gains, and rental income, did not, of course, *per se* constitute criminal offenses. The failure to report these sources was, however, connected with, and formed an integral part of an overall pattern of evasion and false filing, which included the failure to report the illegal payments received from the

towing operators. They were "transactions connected together or constituting parts of a common plan or scheme". Rule 8(a), *supra*.

Since there was commonality of proof between the extortion counts and the tax counts, appellant seeks to avoid the proposition that the charges were properly joined by arguing that inclusion of the other sources of income warranted severance of the tax counts. This is absurd. Even if the tax counts had been severed, the extortion proof would have been admissible to prove these tax counts since it constituted a portion of those *very* charges. Thus, to follow appellant's request would have resulted in two extortion trials, which would have caused the very waste of judicial resources that the joinder rules are designed to avoid. See, generally, Wright, Federal Practice & Procedure, § 141. Moreover, the tax counts could not have been split since the proof of unreported income from *all* sources for a particular year constituted the charge. In sum, the extortion proof was relevant and necessary to prove the tax offenses.

The argument that, in effect, this was an extortion case with tax counts appended, and, as a result appellant was forced to testify, is meritless. Whether the tax charges were joined or not, the credibility of the towing operators would have been, of necessity, in issue in either case. Thus, it seems apparent that McGrath would have testified in his own behalf regardless of the joinder of charges.

The further claim that joinder of false declaration counts was presumptively prejudicial (Appellant's Br., at p. 32) is, likewise, erroneous. A false statement count is properly joined with a substantive tax count. *United States v. Sweig*, 441 F.2d 114, 118 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); *United States v. Isaacs*, *supra*, at 1158-1159. Moreover, the jury did not cumulate the

evidence of the charges and improperly find guilt. Indeed, the jury acquitted appellant on Counts Eleven and Twelve and this demonstrates care and selectivity in the consideration of the charges by the jury. See *United States v. Hutul*, 416 F.2d 607, 620 (7th Cir. 1969); Wright, *op. cit.*, § 227, at p. 469, n.16). This evident discrimination on the part of the jury refutes any claim of prejudice flowing from joinder.

We contend that the denial of the motion for a severance, made pursuant to Rule 14, was not an abuse of discretion, *Application of Gottesman*, 332 F.2d 975 (2d Cir. 1964), but, on the contrary, was entirely proper.

POINT III

The District Court's Evidentiary Rulings Were Correct.

Appellant contends that the District Court committed reversible error on three different instances: (1) that appellant should have been permitted to impeach Randolph W. Taylor, Jr., a prosecution witness, by calling a third person to testify as to specific instances of alleged misconduct not evidenced by a conviction; (2) that it was error to allow the Government to prove a prior consistent statement to rebut a defense charge of recent fabrication; and (3) that it was an abuse of discretion to admit charts which summarized appellant's financial dealings. We contend that these points are meritless.

1. The Taylor Impeachment Evidence

Appellant claims that certain evidence concerning prosecution witness Taylor was improperly excluded.

Taylor, a Parkway police officer, had testified that in 1968 while he was moonlighting for Gullo as a dispatcher he had observed a payoff by Gullo to appellant (1409-11). The day after he witnessed the payoff, Taylor was called into Parkway Chief Nicholas Landers' office, and, despite Landers' prior approval of Taylor's moonlighting, he ordered that Taylor resign from Gullo's employ because of a "conflict of interest" (1422; 1413). Taylor thereafter resigned. He never made an official report of the McGrath payoff because he felt that no affirmative action would have been taken (1425). Taylor knew from a prior experience when he submitted a report concerning "narcotics traffic in the State parks" that, if anything, his knowledge of police illegalities would inure only to his detriment. When he submitted the narcotics report to his supervisors it subsequently disappeared and Taylor was transferred to another section of the police force (Id.).

On cross-examination, Taylor was questioned regarding any difficulties he had with Chief Landers. He explained that during the 1967 Christmas season he saw Landers deliver liquor to Charles Ancona of Charlies. Taylor, quite naturally, thought that Landers had done something wrong (1415). Since that time, Taylor explained, he had been constantly harassed by the Parkway Police (1418), and to the question posed by appellant's counsel "The harassment I think you claimed was that you were arrested several times?" Taylor responded in the affirmative (1423).

On re-direct examination, Taylor explained some of these arrests which he claimed had formed Landers' overall policy of harassment against him. He stated that he was wrongfully charged in 1969 with statutory rape which was subsequently dismissed, and on July 3, 1971, he was charged with criminal mischief for having punc-

tured two automobile tires in a Jones Beach parking lot, which charge he claimed was later "reduced to harassment and dismissed" (1424; 1426).

On re-cross-examination, appellant's counsel again asked Taylor if the harassment charge was dismissed and, if so, upon what basis (1426). Taylor explained that he did not know, but that he had appeared in court on the charges, there was never any trial, and that his attorney would have in his possession a copy of the court papers (Id.). On re-cross-examination, Taylor stated that he resigned from the Parkway Police at a time when no charges were pending against him (1431).

Following Taylor's testimony, appellant sought to have the Government recall Taylor for further cross-examination contending that only after he had testified were certain alleged discrepancies discovered. Appellant took issue with Taylor's testimony that the harassment charge had been dismissed and that he had voluntarily resigned from the Parkway Police (1513). Despite the fact that when he testified Taylor noted his address for the record (1406), appellant claimed that he did not know Taylor's whereabouts but wanted him produced for further testimony (1515). The Government refused to produce Taylor, but offered to furnish appellant with Taylor's most recent known address and telephone number (1518-19). The Court directed the United States Marshal to serve a defense subpoena on Taylor; however, service could not be effected. Of course, this failure to serve Taylor cannot be attributed to the Government. Cf. *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2066-67 (2d Cir., February 28, 1977).

Thereafter, following his inability to recall Taylor, appellant produced a Parkway Police lieutenant and proposed to examine him concerning Commission records

which purportedly proved appellant's disputed points as to Taylor (1772). While the Court was willing to allow Taylor himself to testify as to these collateral issues, it precluded such testimony from being elicited from the lieutenant (1773). The Court's ruling, of course, was entirely correct since extrinsic evidence may not be used to attack the credibility of a witness, other than conviction of a crime. Rule 608(b), Fed. R. Evidence. Accordingly, there was no error.

2. The LaGuardia Prior Consistent Statement

It is also contended that the District Court erroneously allowed the prosecution to introduce a prior consistent statement made by the Government witness LaGuardia in order to rebut a defense claim of recent fabrication.

LaGuardia, as described in detail above, testified that from 1968 to 1973 he had made the required payoffs to appellant. Following his direct examination, LaGuardia was extensively cross-examined for an entire day. One of the main goals of the cross-examination was to show that LaGuardia, who had originally perjured himself before a Grand Jury in 1975 when he denied making any payments to appellant, subsequently falsely implicated him following an agreement with the Government to testify in order to get a perjury indictment dismissed.

To rebut this charge, the Government called on its direct case one Joseph Foley who had managed a gas station for Humble Oil Company, located on the Southern State Parkway, but his employment had been terminated. (865-870). Thereafter, in 1972 Foley and LaGuardia became friends and on one occasion met in a restaurant on Long Island. Foley told LaGuardia that he, Foley, was anxious to return to the parkway. LaGuardia stated that he would arrange a dinner with

appellant to "work something out", but that it would probably cost Foley \$10,000.00 to return to the parkway. The payment, according to LaGuardia, would be made to appellant. The meeting, however, never took place. (868-869).

We contend that this testimony concerning the 1972 statement of LaGuardia about the required payoff to appellant was properly admitted as a prior consistent statement "to rebut an express or implied charge against [LaGuardia] of recent fabrication or improper influence or motive". Rule 801(d)(1), Fed. R. Evidence; see also, *United States v. Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972); *United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972). Since the defense had attempted to establish that LaGuardia had motive to lie and had therefore falsely implicated appellant, Foley's testimony was properly accepted to show that *before* his agreement with the Government, LaGuardia had implicated appellant in connection with highway payoffs. *United States v. Dorfman*, *supra*. For this reason, there was no error.

3. The Financial Charts

Marked as Government exhibits for identification, during the testimony of IRS Special Agent Salvatore Contarino, were three charts summarizing the various sources of appellant's income (1535); bank interest (Govt. Ex. 73); additional income (Govt. Ex. 74); and income obtained from the towing operators (Govt. Ex. 75). Appellant's defense counsel objected to their introduction on the grounds that it was "unfair to show [the charts] to the jury," that the charts should have contained the adjective "claimed" (1521), and on the further ground that the letters were "rather graphic" (1524). After ordering the Government to delete the appellant's name, John McGrath, the Court held that the charts could be used by the witness.

Recognizing "that the admissibility of charts is discretionary with the Court" (Appellant's Br. p. 46), it is now contended that it was an abuse of discretion to admit these particular charts due to their size, layout and content, *Id.* at p. 45. This argument is meritless.

In *United States v. Conlin*, Dkt. No. 76-1346, slip op. 2375 (2d Cir., March 17, 1977), this Court stated that the use of charts to summarize testimony in an income tax case is "a common procedure whose use we have repeatedly approved", Slip op. at p. 2380. There is no claim here that the charts were inaccurate, nor can there be. Thus, the only claim concerns their size—a claim that, we submit, is baseless. Accordingly, there was simply no error in allowing the charts to be used during the agent's testimony.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Stanley Teitler

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of May 1977 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

LEONARD J. MEISELMAN, 54 WILLIS AVE., MINEOLA, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

2nd day of May 1977

1977

MARTHA SCHAEF
Notary Public, State of New York
No. 21-04-10300